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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

RONALD ALMAN, as Trustee, Board of Trustees, Northeast Department ILGWU Health and Welfare Fund, ILGWU Health Services Plan, and ILGWU National Retirement Fund

Petitioner,

v.

GEORGE MANUFACTURING CORP.

and

GEORGE KALELL,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The First Circuit

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QUESTION PRESENTED

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* holds an officer and shareholder who owns and controls the day-to-day operations of a company personally liable for unpaid minimum wages and overtime compensation as an "employer." The Employee Retirement Income Security Act, as amended, ("ERISA") 29 U.S.C. § 1001, *et seq.* adopts the Fair Labor Standards Act definition of an "employer."

The question presented here is whether an officer and shareholder who owns and controls the day-to-day operations of a company and personally makes the decision not to make contributions due health, welfare and pension plans is an "employer" liable for delinquent contributions pursuant to § 502(a)(3) and § 515 of ERISA, 29 U.S.C. §§ 1132(a)(3) and 1145.

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GEORGE KALELL

Respondent

Petition For Writ Of Certiorari To The United States Court of Appeals For The First Circuit

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Petitioner, Ronald Alman ("Alman"), a trustee of employee benefit funds in the garment trades, hereby petitions this Court to issue a writ of certiorari to review a ruling of the United States Court of Appeals for the First Circuit.

Jurisdiction

Jurisdiction in the District Court and the Court of Appeals was founded upon 28 U.S.C. § 1331, 28 U.S.C. § 1337, and 29 U.S.C. §§ 1132(a)(3) and 1145 (1982). The Memorandum and Order of the United States Court of Appeals for the First Circuit affirming the dismissal of Petitioner's claim against Respondent George Kalell was entered on July 21, 1988. In its Order, the United States Court of Appeals for the First Circuit adopted its decision in *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving,* 845 F.2d 23 (1st Cir.), *reh'g denied* (Memorandum and Order, May 26, 1988) ("*Starrett*"). The Memorandum and Order in this case and the Opinion in *Starrett* are reproduced in Appendix A.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982). An Application for Extension of Time in Which To File a Petition For Writ of Certiorari was allowed by Order dated October 7, 1988, extending the time for filing through and including Sunday, December 18, 1988.[1]

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[1]In his Application, Alman stated that he requested the additional time in order to inquire whether the Pension Benefit Guarantee Corporation ("PBGC") would join with him as *amicus curiae.* The PBGC has referred this matter to the Department of Labor, which has taken the matter under advisement.

The National Coordinating Committee of Multiemployer Plans will be joining Petitioner as *amicus curiae* due to the important question on first impression presented by this Petition.

Statutory Provisions Involved

ERISA's declaration of policy provides in pertinent part:

> *Section 1001.* Congressional findings and declaration of policy.
>
> (a) Benefit plans as affecting interstate commerce and the Federal taxing power.
>
> The Congress finds that the growth in size, scope and numbers of the employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; *that the continued well-being and security of millions of employees and their dependents are directly affected by these plans;* that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with

> respect to the establishment, operation, and administration of such plans; . . . that owing to the inadequacy of current minimum standards, *the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered;* . . . and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a) (1982) (emphasis added).

ERISA provides for the collection of delinquent contributions from an "employer". ERISA's definition of employer provides:

> *Section 1002.* Definitions.
>
> For the purposes of this subchapter:
>
> (5) The term *"employer"* means any *person acting directly as an employer, or indirectly in the interest of an employer, in relation to any employee benefit plan;* and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5) (emphasis added). The term "person" is also separately defined.

> (9) The term *"person"* means an *individual,* partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unin-

corporated organization, association, or employee organization.

29 U.S.C. § 1002(9) (1982) (emphasis added).

ERISA's civil enforcement provisions originally provided in pertinent part:

Section 1132. Civil Enforcement

(a) Persons empowered to bring a civil action.

A civil action may be brought —

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3) (1982). In 1980, ERISA was amended to include two additional provisions pertaining to delinquent contributions.

§ *1332(g)* Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce

Section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under Section 6621 of Title 26.

> *Section 1145.* Delinquent contributions.
>
> *Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall,* to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1132(g); 29 U.S.C. § 1145 (1982) (emphasis added).

The Fair Labor Standards Act, as amended, ("FLSA") 29 U.S.C. Section 201 *et. seq.* (1982), also defines "person" and "employer" as follows:

> *Section 203.* Definitions.
>
> As used in this chapter —
>
> (a) *"Person"* means an *individual,* partnership, association, corporation, business trust, legal representative, or any organized group of persons.
>
> (d) *"Employer"* includes any person *acting directly or indirectly in the interest of an employer in relation to an employee* and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

See 29 U.S.C. § 203(a) and (d) (1982) (emphasis added).

Similarly, the FLSA imposes civil penalties on employers who fail to pay minimum wages or overtime.

(b) *Any employer* who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their *unpaid minimum wages,* or their *unpaid overtime compensation,* as the case may be, and in an additional equal amount as liquidated damages. . . .

29 U.S.C. § 216(b) (1982) (emphasis added).

Finally, the National Labor Relations Act ("Act"), as amended, 29 U.S.C. § 141 *et. seq.* (1982), contains certain provisions regarding the requirements for collectively bargained jointly trusteed labor-management health, welfare, and pension funds. In pertinent part, the Act provides:

Section 186. Restrictions on financial transactions.

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations.

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other things of value . . .

(c) Exceptions.

The provisions of this section shall not be applicable . . .

(5) with respect to any money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) *the detailed basis on which such payments are to be made is specified in a written agreement with the employer,* and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund . . . and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which

> shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated *in such written agreement.*

29 U.S.C. §§ 186(a), (c)(5)(A) and (c)(5)(B)(1982) (emphasis added).

Statement of the Case

A. *Statement of Proceedings*

Petitioner Alman filed a complaint on July 3, 1985 in the United States District Court for the District of Massachusetts, alleging that George Manufacturing Corp. ("George Mfg.") and its principal George Kalell ("Kalell") were liable for over one hundred thousand dollars in delinquent contributions to plaintiff health, welfare and pension funds pursuant to § 502(a)(3) and § 515 of ERISA, 29 U.S.C. § 1132(a)(3) and § 1145 (1982). Alman sought and the district court allowed a prejudgment attachment of George Mfg.'s machinery on August 22, 1985. George Mfg. went out of business on October 18, 1985. A Consent Judgment was entered against George Mfg. on October 28, 1985, in the amount of $119,358.94.

Alman filed a Motion for Summary Judgment against Kalell on July 3, 1986. On February 16, 1988, the Court issued an Opinion and Order ruling in favor of Kalell. Alman filed a Motion to Reconsider, which was denied without opinion.

At the time that the district court issued its Opinion and Order, a case presenting similar issues was pending before the United States Court of Ap-

peals for the First Circuit. *See Starrett, supra.* The Court of Appeals requested comment from the parties in *Starrett* on the district court decision in *George Mfg.* The parties in *George Mfg.* also filed amicus briefs in the Court of Appeals on *Starrett.* After the filing of comments and amicus briefs in *Starrett,* the United States Supreme Court issued its opinion in *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.,* — U.S. —, 108 S.CT. 830, (1988) ("*Advanced Lightweight*"), holding that federal courts did not have jurisdiction pursuant to ERISA, 29 U.S.C. § 1145, over suits to collect delinquent contributions which become due after the expiration of a collective bargaining agreement. Comments concerning the impact of *Advanced Lightweight* were filed with the Court of Appeals in *Starrett* pursuant to Rule 28(j), FRAP.

On April 25, 1988, the Court of Appeals issued its opinion in *Starrett.* The Court of Appeals assumed without deciding that the dominant officer/shareholder was an "employer" pursuant to ERISA, 29 U.S.C. § 1002(5). The Court held, however, that the dominant officer/shareholder was not liable for delinquent contributions pursuant to ERISA because he was not a corporate signatory who had a contractual obligation to contribute enforceable by § 1145. *Starrett,* 845 F.2d at 24-26.

The Massachusetts Laborers' Benefit Funds, plaintiffs in *Starrett,* then filed a Petition for Rehearing and Petition for Rehearing en Banc. Petitioner

Alman also filed his appeal in this case in the Court of Appeals. On May 26, 1988, the Court of Appeals denied the Petition for Rehearing and Petition for Rehearing en Banc in *Starrett,* but nevertheless modified its Opinion and Order in some respects. *Id.* at 27. Specifically, the Court of Appeals held that neither § 1132(a)(3) nor § 1145 imposed an obligation to contribute on Peter Starrett. Recognizing that the decision in *Starrett* was dispositive of the issues in *George Mfg.,* Alman consented to a summary disposition of his appeal. The Court of Appeals then entered its final order on July 21, 1988. *See Alman v. George Manufacturing Corp. et al.,* No. 88-1322 (1st Cir. July 21, 1988).

While the Petition for Rehearing in *Starrett* and Alman's appeal in this case were pending, the Supreme Judicial Court for the Commonwealth of Massachusetts issued its opinion in *Commonwealth v. Morash,* 402 Mass. 287, 522 N.E.2d. 409 (1988), *cert. granted,* — U.S. —, 109 S.Ct. 53 (1988) (*"Morash"*), holding that a state statute imposing criminal penalties on corporate officers who failed to pay vacation pay was preempted by ERISA. *Morash* reaffirmed and expanded the Supreme Judicial Court's holding in *Commonwealth v. Federico,* 383 Mass. 485, 419 N.E.2d 1374 (1981), which held that a separate state statute imposing criminal penalties on corporate officers and directors who failed to make contributions to health, welfare, or pension funds was preempted by ERISA.

B. *Statement of Facts*

George Kalell was the sole shareholder, president and treasurer of George Manufacturing Corp. George Mfg. was a small garment contracting shop located in Boston, Massachusetts. George Mfg. was party to a collective bargaining agreement with the Boston Joint Board, Cloak, Skirt & Dressmakers Union, International Ladies' Garment Workers' Union. The collective bargaining agreement provided that the employer would make contributions to the employee benefit funds and that the employer adopted and ratified the by-laws, rules and regulations of each fund.

The workers employed at George Mfg. made women's clothing for jobbers and manufacturers who sold clothing to the retail market. Most of the workers were stitchers who earned at most $6.00 to $7.00 per hour. Approximately 23% of their compensation package consisted of fund benefits — health insurance, prescription medicine, vacation pay, and a modest pension.

Kalell owned and operated George Mfg. He signed the collective bargaining agreement for George Mfg. He controlled the business, its production and its finances. He decided what work would be done, when, how, and for whom. He decided which bills to pay and which bills not to pay. When George Mfg. fell behind in its monthly payments to the funds, it was Kalell who decided to prefer other creditors over the funds. It was Kalell who dealt with the local union and the funds concerning the delinquency and related matters.

Ultimately, Kalell decided to close George Mfg., leaving behind a debt of $119,358.94 to the funds.

The garment industry is a distressed industry. Benefit fund delinquencies such as those involved here are typical and pose a serious threat to the funds and beneficiaries. The pension plan is seriously underfunded and withdrawal liability is currently assessed against withdrawing employers to maintain plan solvency. Under the rules of the Health and Welfare Fund workers laid off due to a shop closing or lack of work may receive vacation pay and health coverage for a full six months after they cease work. Thus, delinquent contributions to the funds not only increases the unfunded liability of the pension plan, but places an additional financial burden on a health and welfare plan which is providing health benefits, prescription drugs and accrued vacation pay to scores of laid off workers for whom no contributions are being made and for whom delinquent contributions are owed.

Alman has been party to over fifty lawsuits in the United States District Court for the District of Massachusetts in which he has sought to recover contributions from declining or defunct garment industry employers and their principals. Prior to *Starrett,* the district court had uniformly held corporate officers like Kalell personally liable for delinquent contributions utilizing the "economic reality" test. *See Trustees of the Amalgamated Insurance Fund v. Danin,* 648 F.Supp. 9 (D. Mass. 1986) (and cases cited). The precedent previously existing in the District of Massa-

chusetts has been critical to if not dispositive of the funds' ability to collect current and delinquent contributions on behalf of low paid worker/beneficiaries in this distressed industry.

Summary of Reasons for Granting the Writ

This Court should grant certiorari in order to address an important question of first impression which vitally affects employee benefit plans and millions of plan beneficiaries throughout the United States. At issue is the ability of health, welfare, and pension plans to recoup delinquent contributions from the sole or principal officer and shareholder of a defunct or depressed business who personally manages the company on a day-to-day basis and who consciously fails to remit promised contributions to employee benefit plans.

The loss of these contributions poses great risks of increased unfunded vested liability in national pension plans. Unfunded liability is paid for by other employers in the form of increased contributions and withdrawal liability payments. The loss of contributions for health insurance, prescription medicine payments, and vacation pay may result in severe underfunding of health and welfare plans, and in many instances causes an immediate cessation of benefits to employees and their dependents.

Three Courts of Appeals have held that controlling corporate officers and shareholders who are personally responsible for the failure to contribute to employee benefit plans may not be held personally

liable for contributions under ERISA in the absence of proof of an alter ego relationship between the corporation and the corporate officer/shareholder. These holdings coincide with certain opinions in the state and federal courts holding that state statutes imposing criminal penalties on corporate officers and directors for nonpayment of vacation pay or fund contributions are preempted under ERISA. This Court has granted certiorari in *Morash* in part to address the latter issue with respect to vacation pay statutes.

The net effect of the opinions of the federal Courts of Appeals restricting the liability of corporate officers under ERISA, coupled with state court decisions such as *Morash* preempting state criminal remedies, is devastating. Remedies available to plans and their beneficiaries to protect plan benefits and enforce the obligation to contribute have been dramatically reduced.

ERISA was intended to increase the protections for plan beneficiaries and improve funding standards. The Court of Appeals' interpretation of ERISA denying individual liability for delinquent contributions substantially contradicts this important Congressional purpose with respect to recovery of delinquent contributions. The Petitioner urges this Court to grant certiorari in order to promote the Congressional purpose and preserve the effectiveness of the federal statutory remedies for enforcing an employer's funding obligation to health, welfare, vacation pay, pension and other employee benefit plans.

Reasons for Granting the Writ

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION WHICH VITALLY AFFECTS THE INTERESTS OF EMPLOYEE BENEFIT PLANS AND MILLIONS OF BENEFICIARIES ACROSS THE NATION.

In enacting ERISA, Congress acknowledged that the "continued well being and security of millions of employees and their dependents are directly affected by these plans." 29 U.S.C. § 1001(a). In large part the statute is designed to ensure that workers who have been promised benefits actually receive them. *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 510 (1981) ("*Alessi*"), *citing Nachman Corporation v. Pension Benefit Guarantee Corporation,* 446 U.S. 359, 361 (1980) ("*Nachman*").

Uncollected delinquencies to employee benefit plans vitally affect a plan's ability to maintain funding standards and provide promised benefits. Many health and welfare funds pay health insurance benefits and vacation pay out of the current income stream. When contributions are not recovered, coverage is reduced or ceases altogether, with serious consequences for employees and their dependents. In this case, the health and welfare fund provides coverage for up to six months after work ceases. Employer delinquencies therefore place additional financial strain on such a fund which typically suffers from substantial delinquencies. Unlike vested pension benefits, which are ultimately guaranteed by the PBGC, there is no federal or other guarantee of plan benefits such as

health insurance and vacation pay. A cessation or reduction in benefits due to underfunding is final unless contributions are subsequently recouped and recredited.

Because of ERISA's special vesting provisions, *see Nachman, supra,* certain pension benefits are guaranteed. Nevertheless, this guarantee is paid for in higher contribution rates, and in the assessment of higher rates of withdrawal liability against withdrawing employers. Ultimately, the taxpayer foots the bill if the PBGC is required to make pension payments.

It is therefore critical to plans, employees, and their dependents that participating employers, broadly defined, make timely and complete payment of the contributions required to maintain these important benefits. The imposition of personal liability against a controlling officer/shareholder who is personally responsible for the nonpayment not only reduces or eliminates the delinquency itself, but provides a strong and much needed deterrent against delinquency by making timely payment out of corporate assets. Clearly the issues raised by this Petition are of national importance and affect the administration of plans and millions of employee participants and their dependents.

A. This Court Should Determine An Important Question of First Impression, Whether A Controlling Officer and Shareholder Who Personally Decides Not to Make Required Contributions Is Liable for the Unpaid Contributions Under ERISA'S "Economic Reality Test".

In the years since ERISA's passage, the Court has granted certiorari to hear a number of cases involving key questions central to the effectiveness administration of the statute. In *Nachman, supra,* the Court granted certiorari to decide the definition of the term "nonforfeitable" benefits under ERISA. In *Advanced Lightweight, supra,* the Court granted certiorari to determine the scope of the trustees' powers to enforce an employer's obligation to contribute after the expiration of a collective bargaining agreement.[2] Of even greater importance is the trustees' powers to pursue delinquent employers to ensure that benefits are adequately funded. The Court should therefore grant certiorari here to determine whether the term "employer" in ERISA encompasses a controlling officer and shareholder who is personally responsible for failing to make required contributions.

Three Courts of Appeals have decided this issue. In *Solomon v. Klein,* 770 F.2d 352 (3d Cir. 1985), the Third Circuit summarily rejected any claim against a corporate officer based on an "economic reality" test. In *Starrett,* the Court of Appeals for the First Circuit

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[2] The Court has accepted a variety of cases which address both the nature of benefits and available remedies. *See Alessi, supra* (upholding a Treasury Department regulation permitting the offset of workers compensation benefits); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, et al. v. Norris,* 463 U.S. 1073 (1983) (propriety of sex based benefit payments); *Massachusetts Mutual Life Insurance v. Russell,* 473 U.S. 134 (1985) (denying extra-contractual damages for claim denials); *Pilot Life Insurance Co. v. Dedeaux,* — U.S. —, 107 S.Ct. 1549, (1987) (concerning preemption of certain common law tort claims).

examined the legislative history and this Court's opinion in *Advanced Lightweight,* and concluded that ERISA's enforcement provisions applied only to corporate signatories to a collective bargaining agreement or a plan. Most recently, the Court of Appeals for the District of Columbia rejected the "economic reality" test, relying in large part on the reasoning in *Starrett. See International Brotherhood of Painters and Allied Trades Union, et al v. George A. Krachner, Inc., et al.,* 856 F.2d 1546 (D.C. Cir. 1988) ("*Krachner*")[3]. Several district courts outside of these three circuits have employed the "economic reality" test to impose personal liability on controlling officers and shareholders. *See Gambino v. Index Sales Corp.,* 673 F.Supp. 1450 (N.D. Ill. 1987); *West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Company, Inc., et al,* 685 F.Supp. 953 (S.D. W.Va. 1988);[4] *Upholsterers International Union Health & Welfare Fund Trustees v. Pontiac Furniture, Inc.,* 647 F.Supp. 1053 (C.D. Ill. 1986); *Balcolm v. Southeastern Florida Properties, et al.,* No. 84-156 (S.D. Fla. June 28, 1985), *discussed in Laborers Local 938 Joint Health and Welfare Trust Fund, et al v. B.R. Starnes Company of Florida, et al,*

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[3] *Krachner* also relied on the proposition that the FLSA enforced statutory, not contractual, liabilities. This proposition is incorrect as a matter of law. The FLSA imposes personal liability on a dominant officer and shareholder who fails to pay overtime wages, calculated at time and one-half the regular rate of pay specified in the collective bargaining agreement. 29 U.S.C §§ 207(a)(1) and 216(b)(1982); 29 C.F.R. §§ 778.108-778.110.

[4] Although this case was decided after *Starrett,* it does not discuss or consider it.

658 F.Supp. 305, 309 (S.D. Fla. 1986), *aff'd* 827 F.2d 1454 (11th Cir. 1987).[5]

1) *ERISA adopts the "economic reality" test.*

The ERISA definition of "employer" is virtually identical to the definition of "employer" contained in the FLSA. *Compare* 29 U.S.C. Fair Labor Standards, § 203(a) and (d) *with* 29 U.S.C. § 1002(5) and (9). Between the enactment of the FLSA in 1938 and the enactment of ERISA in 1974, the federal courts had many occasions to construe the definitions of "employer" under the FLSA. This Court has looked not to common-law concepts but to a far more expansive test in determining the scope of employer status under the FLSA. *See Goldberg v. Whitaker,* 366 U.S. 28, 33 (1961) (noting the "expansiveness" of the FLSA definition of employer); *See also Falk v. Brennan,* 414 U.S. 190, 195 (1973). Numerous lower courts addressed the question of the individual liability of corporate officers under the FLSA. They unanimously applied the "economic reality" test to hold those individuals who were the dominant shareholders and

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[5] Respondent will likely argue that the petition should be denied because there is no split in the decisions of the Courts of Appeals at this time. Where the issue presented is central to the effective administration of ERISA plans, this Court has granted certiorari in the absence of any significant differences between the Court of Appeals. *See Nachman, supra; Advanced Lightweight, supra,* and cases cited at n.2 above. The importance of a uniform national policy in the administration of employee benefit plans is paramount. Prompt resolution of issued central to the statute's administration and/or enforcement is preferred. *See, generally, Nachman, supra; Advanced Lightweight, supra.*

officers and who ran their corporations on a day-to-day basis personally liable for unpaid wages and overtime compensation. *See, e.g. Fortuna Broom Co. v. Wirtz,* 379 F.2d 327 (5th Cir. 1967); *Chambers Construction Company v. Mitchell,* 233 F.2d 717, 724-5 (8th Cir. 1956); *Shultz v. Chalk-Fitzgerald Construction Co.,* 309 F.Supp. 1255, 1257 (D.Mass. 1970) (and cases cited). The First Circuit also adopted this view in 1983. *See Donovan v. Agnew,* 712 F.2d 1509 (1st Cir. 1983) ("*Donovan*").

The Court of Appeals in *Starrett* assumed that the ERISA definition of employer encompassed this broad "economic reality" test. In that respect, *Starrett* represents a pointed departure from the Third Circuit's cursory rejection of the theory in *Solomon v. Klein.* The Court of Appeals in *Starrett* concluded, however, that § 502 and § 515 of ERISA, 29 U.S.C. §§ 1132(a)(3) and 1145 (1982), limited the class of employers who were obligated to contribute to corporate employers who were signatories to the collective bargaining agreement or the plan, or their alter egos.

This holding produces an illogical result at variance with the statute's plain meaning and its broad remedial purposes. Congress specifically included the key word "employer" in Title I. That word had a well-defined meaning in 1974 when § 1002(5) and § 1132 were enacted. Section 1145 refers to "[e]very" employer, not just "some" employers. The statutory definition of employer was not amended or altered in 1980 when § 1145 was enacted. The Courts of Appeals have simply written the definition of employer out of the

§ 1132(a)(3) and § 1145, contrary to the plain meaning of the statute. *See Gambino, supra* (holding § 1145 does not limit the § 1002(5) definition of employer).

In *Starrett* the Court of Appeals supported its construction of §§ 1132(a)(3) and 1145 by noting that the § 1002(5) definition of "employer" still retained some vitality with respect to the employer property and prohibited transaction provisions of ERISA. 29 U.S.C. §§ 1103(c)(1) and 1106-1108. This construction of § 1002(5), § 1132 and § 1145 would subject individuals to statutory *prohibitions,* but *not* to the sole statutory *obligations* imposed by subchapter I of ERISA on employers. The net result would be that an individual employer participating in a multiemployer plan could be sued personally for profiting from or bankrupting a plan due to a prohibited transaction, but could not be sued individually for failing to fund the plan at all. Similarly, an employer who made false statements in a contribution report to reduce his corporation's contribution liability might be fined or jailed, *see U.S. v. S & Vee Cartage Co., Inc.,* 704 F.2d 914 (6th Cir.), *cert. denied,* 464 U.S. 935 (1983), but could not be required to repay the resulting delinquent contributings in a civil suit. This fragmentation of ERISA's enforcement scheme is certainly not required by the statute.

None of these inconsistencies in statutory interpretation are presented, however, if one construes the reference in § 1132(a)(3) and § 1145 to a "plan" or "collective bargaining agreement" to be words of explanation, not limitation. At the time that both

§ 1132(a)(3) and § 1145 were passed, both the governing labor laws and ERISA plans were valid only if made pursuant to written plans and agreements. Section 302 of Taft-Hartley, 29 U.S.C. § 186(c)(5)(B), specifically provides that contributions to collectively bargained funds are unlawful unless there is a written agreement with the employer specifying the nature and amount of contributions. These provisions of Taft-Hartley predate ERISA by decades. The reference to the terms of a "plan" or "collective bargaining agreement" in § 1145 is simply a recognition of the preexisting statutory requirement that no employer can be lawfully obligated to contribute in the absence of a collective bargaining agreement and/or a plan.

2) *Starrett* misapprehends this Court's decision in *Advanced Lightweight.*

In *Advanced Lightweight* this Court affirmed the unanimous rulings of the Court of Appeals holding that the NLRB retained exclusive jurisdiction over post-contract expiration claims for delinquent contributions. This Court held that § 1145 of ERISA authorized suits for "promised contributions" only during the contract term. It also held, however, that the NLRB retained the power to enforce a statutory obligation to continue making contribuions even after contract expiration. *Advanced Lightweight* in fact reemphasizes and reaffirms a fundamental tenet of our national labor laws, namely, that Congress may and has established particularized statutory programs which create and enforce statutory employer obligations which wholly supercede traditional private con-

tractual duties. The reasoning in *Advanced Lightweight* supports the conclusion that ERISA, like the FLSA, creates such an independent statutory obligation with respect to a broad class of employers. The statute's enforcement should not be abrogated.[6]

B. This Case Should Be Considered in Conjunction With *Commonwealth v. Morash* Because These Cases Have A Profound Effect on the Enforcement of the Obligation to Contribute Under ERISA.

As the First Circuit itself had previously noted, "[t]he threat of personal liability should be enough to induce the individuals who control corporations to prefer the IRS and employee creditors over other creditors in times of financial difficulty." *DeBreceni v. Graf Bros. Leasing Inc. et al.*, 828 F.2d 877, 881 (1st Cir. 1987), *cert. denied* — U.S. — 108 S.Ct. 1024 (1988). By limiting employer liability for delinquent contributions to corporate signatories in *Starrett, Solomon,* and *Krachner* the Courts of Appeals seriously undermine one of ERISA's most effective inforcement mechanisms. As this Court has so aptly stated in an

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[6] *Starrett* also acknowledges that the legislative history of § 1145, discussed in *Advanced Lightweigth* as 385-386 and n. 15, is not directly on point. Nevertheless, both *Starrett* and *Krachner* appear to rely heavily on that legislative history. It goes without saying that legislative history connected with the 1980 amendment resulting in the passage of § 1145 cannot shed any light on the meaning of "employer" as originally enacted in §§ 1002(5) and 1132 in 1974. Fairly read, the legislative history demonstrates that the amendment's proponents intended to streamline and expand ERISA remedies by creating a federal statutory liability for delinquencies unencumbered by traditional labor law defenses except for those explicitly founded on 29 U.S.C. § 186(c)(5)(B).

anti-trust context, these rulings "by the Court[s] of Appeals seem[ ] to threaten the effeciveness of the private action as a vital means of enforcing the . . . policy of the United States." *Perma Life Mufflers v. International Parts Corp., et al.,* 392 U.S. 134, 136 (1968). Certiorari should be granted in order to address this issue so central to the effective enforcement of the statutory policy of insuring the provisions of benefits through fiscally sound plans.

The importance of the availability of ERISA remedies against corporate officers is underscored by the Court's recent grant of certiorari in *Morash.* One of the issues before the Court in that case is whether a state wage law imposing criminal penalties for nonpayment of vacation pay is a "generally applicable criminal law" exempted from ERISA preemption. 29 U.S.C. § 1441(b)(4)(1982). As the petition for and opposition to writ of certiorari in *Morash* make clear there is no uniformity of opinion amongst the lower state and federal courts on this most important issue. Moreover, the highest court of the State of New York has ruled that the imposition of civil penalties against corporate officers and shareholders for nonpayment of benefit fund contributions is not preempted, *see Sasso v. Vachris,* 66 N.Y. 2d 28, 484 N.E. 2d 1359, 494 N.Y.S. 2d 856 (1985), while the reasoning of other state and federal cases would appear to preclude such a result. *See, e.g., Commonwealth v. Federico, supra* (criminal penalties); *McMahon v. McDowell,* 794 F.2d 100 (3d Cir.), *cert. denied,* 107 S.Ct. 473 (1986) (civil and criminal remedies preempted).

Whatever the outcome may be of the Court's review in *Morash*[7], petitioner respectfully submits that the issue of the scope of ERISA remedies against corporate officers and directors and the scope of the ERISA preemption of state criminal statutes for non-payment of wages are related issues. For Trustees such as Alman, the combined effect of cases such as *Starrett, Morash,* and *Federico* simply shatters the ERISA enforcement scheme with respect to an important class of delinquent employers. The remedies available are now fewer and less effective than the remedies available prior to the passage of ERISA. For workers such as those who have lost their vacation pay in *Morash,* the result is even more incongruous. In order to receive their vacation pay they must now institute suit in federal court and assert either that their employer is a fiducuary who breached duties to them as beneficiaries and/or that their employer is the alter ego of a corporation and is liable for payment. *See generally, Bruch v. Firestone Tire & Rubber Company, et al.,* 828 F.2d 134 (3d Cir. 1987), *cert. granted* — U.S. —, 108 S.Ct. 1288 (1988); *Local Union 2134, United Mine Workers of America v. Powhatan Fuel, Inc., et al.,* 828 F.2d 710 (11th Cir. 1987). It is inconceivable that Congress intended to place these

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[7] The Court may decide *Morash* on the first question there presented, whether the vacation pay paid out of general revenues is an ERISA plan. If the Court answers that question "no", then it may not reach the preemption issue. For that reason, and the reasons stated at pp. 17 to 24, *infra,* petitioner submits that the issue presented by this case should be accepted for review at this time regardless of the outcome in *Morash.*

types of obstacles in the path of workers seeking to obtain statutorily protected benefits.

Conclusion

For these reasons, the Petitioner requests that the Court grant the writ and review and reverse the decision of the United States Court of Appeals for the First Circuit.

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Dated: December 15, 1988

United States Court of Appeals
For the First Circuit

No. 88-1322

RONALD ALMAN, ETC.,
Plaintiff, Appellant,

v.

GEORGE MANUFACTURING CORP., ET AL.,
Defendants, Appellees.

Before

COFFIN, BOWNES, AND TORRUELLA,
Circuit Judges.

MEMORANDUM AND ORDER

Entered July 21, 1988

Both parties agree that the present appeal is controlled by *Mass. Laborers' Health & Wel. F.* v. *Starrett Paving,* 845 F.2d 23 (1st Cir. 1988), *reh'g denied,* (memorandum and Order May 26, 1988). We are not sure what appellant means in the final sentence of his response to the Motion for Summary Disposition, but based on our examination of the briefs we are sure that the Motion for Summary Disposition should be granted. We grant the Motion for Summary Disposition and affirm the judgment of the district court. Loc.R. 27.1.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

The MASSACHUSETTS LABORERS' HEALTH AND WELFARE FUND, et al., Plaintiffs, Appellees,

v.

STARRETT PAVING CORP., et al., Defendants, Appellees.

PETER STARRETT, Defendant, Appellant.

No. 87-1806.

United States Court of Appeals,
First Circuit.

Heard Jan. 4, 1988.

Decided April 25, 1988.

Memorandum and Order on Denial of Rehearing May 26, 1988.

Robert Weihrauch, Worcester, for defendant, appellant

John Andrew Thompson, Randolph, for plaintiffs, appellees.

Before CAMPBELL, Chief Judge, BREYER and SELYA, Circuit Judges.

BREYER, Circuit Judge.

Four multiemployer pension plans ("the Plans"), invoking the legal authority of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1982), sued the Starrett Paving Corporation and its owner, Peter Starrett, seeking contributions the corporation had promised, but failed, to make. 29 U.S.C. § 1145. The corporation went bank-

rupt; the district court said that Peter Starrett, the corporation's president and sole shareholder, must himself make the payments. Peter Starrett now appeals, claiming (among other things) that, even assuming ERISA requires his company to make the pension payments, it does not require him to do so. We agree with Starrett that the relevant language of ERISA does not impose an obligation upon him to make the payments his company owed.

I

Among other things, ERISA imposing upon employers who promise to contribute to an employee pension plan, a *federal* obligation to make those contibutions. It thereby offers federal court remedies, along with court costs, attorney's fees, and liquidated damages or interest, to those who seek to collect delinquent contributions, 29 U.S.C. § 1132(g)(2). The ERISA language that creates the federal obligation reads as follows:

> Every employer who is obligated to make contributions to a multiemployer plan . . . shall . . . make such contibutions in accordance with the terms and conditions of such plan of such plan or such agreement.

29 U.S.C. § 1145. For purposes of this appeal, we shall assume that the Starrett Paving Corporation owed the money (though this is in fact disputed). It is conceded, however, that Peter Starrett, the appellant, had not *himself* promised to make the relevant pension contributions. We also assume (and it is virtually

conceded) that this is not a corporate-veil piercing case. We cannot say, under *state* or other relevant federal law, that Peter Starrett simply *is* the corporation or *is* its alter ego; we therefore cannot say that the corporation's promise to pay "is" Starrett's promise. *Cf., e.g., Alman v. Danin,* 801 F.2d 1 (1st Cir. 1986) (piercing corporate veil to establish ERISA liability).

Thus, the issue before us is whether the statutory language quoted makes Peter Starrett personally liable for his corporation's promised contributions solely in virtue of his position as chief officer/shareholder of the corporation. To answer that question, we must decide if he is (1) an "employer," (2) "who is obligated to make contributions to a multiemployer plan."

II

When this case was initially argued, the parties and this court believed that appellant's liability turned on the meaning of ERISA's definition of the word "employer." The Act says:

> The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5). Courts have found the phrase "act . . . indirectly in the interest of an employer" difficult to interpret. Some courts, in contexts like this one, have limited § 1002(5)'s definition to corporate-

veil piercing cases, perhaps due to fears that a broad interpretation of this language might too readily impose *personal* liability on shareholders or corporate officers or even ordinary corporate employees, for obligations of the *corporation. Solomon v. Klein,* 770 F.2d 352 (3d Cir.1985); *Audit Services, Inc. v. Rolfson,* 641 F.2d 757 (9th Cir.1981). Other courts have noted the similarity of § 1002(5)'s language to that of § 3(d) of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 203(d) (1982), which this circuit (and others) have interpreted more broadly to impose personal liability for minimum wage payments upon a corporation's "chief executive officer/major shareholder" where "economic reality" was that this owner/shareholder might be viewed, if not as a "corporate alter ego," at least as one personally responsible for making (or not making) the legally required wage payments. *See Falk v. Brennan,* 414 U.S. 190, 195, 94 S.Ct. 427, 431, 38 L.Ed.2d 406 (1973) (apartment managing company is "employer" of apartment workers under FLSA); *Goldberg v. Whitaker,* 366 U.S. 28, 33, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961) (knitted goods cooperative is, according to "economic reality," an "employer" under FLSA); *Donovan v. Agnew,* 712 F.2d 1509, 1510-11 (1st Cir.1983) (corporate officers with significant ownership interests are personally liable for bankrupt corporation's FLSA liability) (citing *Hodgson v. Royal Crown Bottling Co.,* 324 F.Supp. 342, 347 (D.Miss.1970) (president of corporation who owns 50 percent of its stock is proper defendant to FLSA injunction), *aff'd,* 465 F.2d 473 (5th Cir.1972)); *Shultz v. Chalk-Fitzgerald Construction*

Co., 309 F.Supp. 1255 (D.Mass.1970) (president/dominant shareholder of closed corporation personally liable as FLSA "employer"); *Chambers Construction Co. v. Mitchell,* 233 F.2d 717, 724-25 (8th Cir.1956) (president/incorporator of company is proper defendant in regard to FLSA injunction). In view of many courts, the similarity in FLSA and ERISA's language dictates a similar result in at least some ERISA cases. *See Trustees of the Amalgamated Insurance Fund v. Danin,* 648 F.Supp. 1142, 1144-46 (D.Mass.1986) and cases cited therein.

We previously left open the question of how to interpret ERISA's definition of "employer" in § 1002(5). *See DeBrecini v. Graf Brothers Leasing, Inc.,* 828 F.2d 877, 880 n. 2 (1st Cir.1987), *cert. denied* — U.S. —, 108 S.Ct. 1024, 98 L.Ed.2d 988 (Feb. 23, 1988). Were we to decide that question now, we should likely side with the Plans, accepting the interpretation of our district courts. The legislative history of ERISA shows that when Congress enacted ERISA in 1974, it copied the definition of "employer" from ERISA's 1958 predecessor, the Welfare and Pension Plans Disclosure Act, Pub.L. No. 85-836, § 3(a)(4), 72 Stat. 997, 998 (1958), *amended by* Pub.L. No. 87-420, 76 Stat. 35 (1962), *repealed by* ERISA, Pub.L. No. 93-406 § 111(a)(1), 88 Stat. 829, 851 (1974); and, as far as we can tell, the drafters of the 1958 Act copied FLSA. Before Congress enacted ERISA in 1974, several courts had adopted a "broader-than-common-law" interpretation of the definition, and two Supreme Court opinions used "economic reality" language. *See Agnew,* 712 F.2d at 1510–11, and cases

cited therein. In addition, the two statutes, FLSA and ERISA, have a broadly similar objective, the one seeking to guarantee the worker a reasonable *present* wage payment and the other looking to a guarantee of his *future* economic security. These factors seem sufficient to warrant similar intepretations of the language defining "employer" in the two statutes. Thus, we shall assume (but we need not definitely decide) that for purposes of § 1145, appellant Starrett is an "employer" under § 1002(5).

III

After we heard argument in this case, the Massachusetts district court decided in a very similar case that an owner/manager of a corporation, even if an "employer" under ERISA's definition, was not an employer *"obligated to make ... contributions to an employee welfare plan." Alman v. George Manufacturing Corporation,* 680 F.Supp. 56, 57 (D.Mass.1988); *see also Mason Tenders District Council Welfare Fund v. Dalton,* 648 F.Supp. 1309 (S.D.N.Y.1986); *Solomon v. Laranne Sportswear Corporation,* 648 F.Supp. 407 (E.D.N.Y.1986). The parties at our request then presented to us their views of *George,* and the employer and the pension plans in the *George* case ("the amicus plans") filed amicus briefs in this case. Having considered their arguments, we have concluded that the district court's view of the statute in *George* is correct. Starrett is not an "employer ... obligated to make contributions to an employee welfare plan."

Consequently, ERISA does not impose upon him the *federal* duty to "make such contributions."

For one thing, the statute's language quite clearly states that the duty in § 1145 arises only in respect to employers *"obligated"* to make the contributions. Although Starrett's corporation may have been "obligated" to make the contributions, Starrett personally was not. For another thing, the legislative history of § 1145 indicates that the language means what it says. When Congress enacted the provisions in 1980, the Senate Committee on Labor described it as follows:

> The public policy of this legislation . . . mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are *already contractually* obligated to make contributions to multiemployer plans.

Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm.Print 1980) (emphasis added). Similarly, one of the provision's chief sponsors in the House of Representatives said that "[t]he bill imposes a Federal statutory duty to contribute on employers that are *already obligated* to make contributions to multiemployer plans." Remarks of Rep. Frank Thompson, Jr., House Debate on the Multiemployer Pension Plan Amendments Act of 1980, 126 Cong.Rec. 23039 (August 25, 1980) (emphasis added), *reprinted in,* Bureau of National Affairs,

ERISA, Selected Legislative History 125 (1986). One who would be obligated to make a payment in the absence of ERISA might be one "already obligated," but one who, like Starrett, has no such prior, independent obligation is not.

Further, the Supreme Court, in a somewhat different context, has recently held that an employer is not contractually obligated to contribute to a plan once the relevant bargaining agreement has expired, and *that being so,* § 1145 does not permit a plan to sue for the contribution. *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.* — U.S. —, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988). The court read § 1145's legislative history as showing that the statute's purpose was "to give employers a strong incentive to honor their *contractual* obligations to contribute and to facilitate the collection of delinquent accounts." *Advanced Lightweight Concrete,* 108 S.Ct. at 835 (emphasis added). *See also id.* at 836, n. 16 (interpreting word "obligated" of § 1145 to exclude employer's *statutory* obligations).

Finally, the various arguments that the several parties advance here fail to convince us to depart from the express words of the statute. First, they say that the literal reading would make useless, hence meaningless, the broad definition of the word "employer" found in § 1002(5). In fact, however, the expanded definition could still make a difference elsewhere in the Act. *See, e.g.,* 29 U.S.C. § 1103(c)(1) (assets of ERISA pension plan "shall never inure to the benefit

of any employer"); §§ 1106-07 (defining the terms "employer security" and "employer real property" and prohibiting plans from acquiring or holding either unless explicitly permitted under law); § 1108 (creating procedure under which Secretary of Labor can exempt particular plan transactions in employer assets from prohibitions of §§ 1103-07); *Donovan v. Walton,* 609 F.Supp. 1221, 1226-27 n. 8(S.D.Fla.1985) (observing ERISA's restrictions on whether plan fiduciaries can be related to *employer*), *aff'd sub nom. Brock v. Walton,* 794 F.2d 586 (11th Cir.), *rehearing denied,* 802 F.2d 1399 (11th Cir. 1986).

Second, they say that the legislative history shows less than we suggest, for Congress did not focus on the specific issue before us now. Remarks of Rep. Frank Thompson, Jr., *supra.* This, of course, may well be true; but even if we do our best to read the history through the eyes of the Plans or the amicus plans, we can find nothing that suggests we should not follow the statute's plain meaning. *See, e.g., North Dakota v. United States,* 460 U.S. 300, 312, 103 S.Ct. 1095, 1102, 75 L.Ed.2d 77 (1983) (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)).

Third, the Plans fear that a literal reading of § 1145 would not permit corporate veil piercing. *See Gambino v. Index Sales Corporation,* 673 F.Supp. 1450, 1456 (N.D. Ill.1987). We do not think that is so. When state law pierces the corporate veil, where the owner is the corporation's alter ego, where state or other relevant federal law makes the owner liable, it is fairly

easy to say that the owner *is* the corporation, and that the owner is therefore an "employer" (under ERISA's definition) "who is obligated" (under state or other relevant federal law) "to make contributions to" a pension plan. Indeed, in such a case he is an employer *already obligated* (see p. 25, *supra*) to make the contributions. One cannot say that here, where neither state nor other federal law obligates the owner to make the contributions. He is not a person *already obligated* to make the contribution. His would have to be an obligation that § 1145 of ERISA alone would have to create.

Fourth, the Plans point out that § 1145 was enacted in 1980 as part of the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. No. 96-364, 94 Stat. 1208 (1980), six years after Congress enacted the broad ERISA definition of "employer." That fact, however, does not seem very important, in light of the further fact that before the date Congress passed § 1145, no federal court had published an opinion interpreting § 1002(5) in the broad way urged upon us by the Plans.

Fifth, the amicus plans say that the words "obligated to make contributions" are words of "explanation, not limitation." But even if we take these words as words of "explanation," they seem to explain *whom* ERISA obliges, and we can find nothing else in the statute that imposes an ERISA obligation to contribute on persons whom state law (or some other law) does *not* oblige. *Cf. Advances Lightweight Concrete,* 108 S.Ct. at 835.

Sixth, both the Plans and the amicus plans argue generally that, like the FLSA, ERISA aims to protect workers by securing the payments due them. We agree. But, we also note that an ERISA-type fund is not necessarily as helpless when faced with a financially shaky, but closely held, corporation as is a worker seeking payment of a minimum wage. Congress may have thought that, compared to a worker who needs FLSA's minimum wage protections, a worker entitled to ERISA-protected pension fund payments may find it easier (perhaps through his union) to secure a written promise of personal liability from the owner of the shaky corporation. If so, the former may be in greater need of federal protection than the latter. Whether or not this is so, however, we do not see how general considerations of need can carry us beyond the statute Congress wrote.

Finally, the Plans do not, and cannot, argue that a literal interpretation renders the statute meaningless, for it does not. As we have pointed out, § 1002(5)'s definition still applies to other parts of ERISA. As we have also pointed out, even if the class of persons liable under § 1145 is the same as those already liable under state (or some other) law, federal liability means easier collectibility because of ERISA provisions for, *e.g.,* attorney's fees, liquidated damages, and interest.

For these reasons, we must interpret the statute in accordance with its "plain meaning." *See North Dakota,* 460 U.S. at 312, 103 S.Ct. at 1102; *GTE Sylvania,* 447 U.S. at 108, 100 S.Ct. at 2056.

The order of the district court granting summary judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

MEMORANDUM AND ORDER

In a rehearing petition, the appellees raise several arguments not previously made. Because the statutory interpretation question is difficult, and because the parties previously had only a short time to file the supplementary briefs that we requested, we believe it appropriate to address those arguments.

First, the appellees point out that the source of "corporate veil-piercing" or "alter ego" liability is not state law, but rather, federal law. They are technically correct. *In Alman v. Danin,* 801 F.2d 1, 3–4 (1st Cir.1986) (cited at page 3 of our opinion), this court looked to congressional policy, not state law, in deciding that a company's incorporators were personally liable for unpaid pension fund contributions under an "alter ego" theory of liability, applying a three-factor test developed by other federal courts. But, though technically federal, the law takes its content in part from related state law. *See Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch,* 757 F.2d 184, 190 (8th Cir.1985) ("federal substantive law applies, *although the courts may look to state law for guidance"*) (emphasis added) (*cited in Alman,* 801 F.2d at 4.) Since, as we mentioned, we can find no basis here for "corporate veil-piercing," or "alter ego" liability (the parties did not argue any such basis), this legal fact does not change the result, though we

have modified the opinion to make clear that the relevant source of liability is either state law or other appropriate federal law.

Second, the parties argue that our interpretation of 29 U.S.C. § 1145 (1982) conflicts with the language of 29 U.S.C. § 1132(a)(3) (1982), a jurisdictional provision of ERISA. Section 1132 reads, in relevant part, as follows:

> § 1132 Civil enforcement
>
> (a) Persons empowered to bring a civil action
>
> A civil action may be brought . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 1132 ultimately relies on definition of the term "employee welfare benefit plan" contained in 29 U.S.C. § 1002(1), (2)(A) (1982) which includes "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or any employee organization" which meets certain criteria. *See also* 29 U.S.C. § 1002(3) (1982) (defining "employee benefit plan" as a certain type of "employee welfare benefit plan"). As we read § 1132, it simply states that a person may bring a lawsuit to enforce a plan's terms or to enforce other, substantive provi-

sions of the Act. The section does not *itself* create legal obligations. If the pension plan alone, or the plan together with some other law, creates a legal obligation, § 1132 permits the federal courts to enforce that obligation; the section does not itself provide for recovery from, say, an unrelated person; and, whether a person sued is, or is not, sufficiently related to a pension plan to be liable for delinquent contributions would seem a question normally to be answered by other law beyond § 1132. Here, the parties pointed only to § 1145 as a possible source of liability.

Finally, we note that the parties' rehearing petition does not present us with any plausible intepretation of § 1145 (an interpretation reasonably consistent with its language), other than the interpretation we have given it. That being so, we continue to believe that our previous view of the statute is correct.

The petition for rehearing is denied.

Supreme Court, U.S.
FILED
DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1008

IN THE

Supreme Court of the United States

October Term, 1988

RONALD ALMAN, as Trustee, Board of Trustees, Northeast Department, ILGWU Health and Welfare Fund, ILGWU Health Services Plan, and ILGWU National Retirement Fund

Petitioner,

v.

GEORGE MANUFACTURING CORP.

and

GEORGE KALELL,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The First Circuit

SUPPLEMENTAL APPENDIX

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Alman v. George Mfg. Corp.
No. 85-2754-T (D. Mass. February 11, 1988) (Order) B-6

United States District Court
District of Massachusetts

RONALD ALMAN, as Trustee, Board of Trustees, Northeast Department, ILGWU Health and Welfare Fund, ILGWU Health Services Plan, and ILGWU National Retirement Fund,

Plaintiff

v.

GEORGE MANUFACTURING CORP. and GEORGE KALELL,

Defendants

CA No. 85-2754-T

MEMORANDUM

February 11, 1988
Docketed February 16, 1988
Motion for Reconsideration Denied March 10, 1988

TAURO, D.J.

Plaintiff, trustee of three International Ladies' Garment Workers' Union ("ILGWU") employee benefit funds ("the Funds"), seeks to collect unpaid pension, health and welfare contributions from the defendants, George Manufacturing Corporation ("the Corporation") and George Kalell, its sole shareholder, officer and director. The action is brought pursuant to §§ 502(a)(3) and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§1132(a)(3) and 1145 (1982). Both plaintiff and Kalell have moved for summary judgment.

I.

The Corporation and the Boston Joint Board, Cloak, Skirt and Dressmakers' Union (an association of ILGWU locals) were parties to a collective bargaining agreement covering the Corporation's employees. The agreement was signed by Kalell on behalf of the Corporation.

Under the collective bargaining agreement, the Corporation was required to make periodic contributions to the funds. Beginning some time in 1983, the Corporation fell in arrears and, as of February 23, 1985, owed $122,758.94 to the Funds.

Plaintiff filed the instant action on July 3, 1985 to collect the past-due contributions. All parties, thereafter, stipulated that judgment would enter against the Corporation for $119,358.94.[1] Judgment entered on October 28, 1985.

Plaintiff's judgment against the Corporation has remained substantially unsatisfied, because the Corporation is insolvent.[2] Plaintiff, consequently, seeks to recover the Corporation's debt from Kalell personally on the grounds that, as a matter of "economic reality",

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[1]The figure of $119,358.94 represents obligations which had accrued through February 23, 1985, minus payments received of $3,400. The judgment also provided for payment of interest at the rate of 9% from February 23, 1985; costs of $130; and attorney fees of $1,840.

[2]The Corporation ceased its manufacturing operations on October 18, 1985, and executed an assignment for the benefit of creditors the same day. The Corporation's machinery was sold at auction on October 25, 1985. Plaintiff was entitled to a distribution from the assignee on his claim against the Corporation.

a corporate officer-shareholder in Kalell's position is an "employer" under § 3(5) of ERISA, 29 U.S.C. § 1002(5) (1982) (defining "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan").[3]

II.

Kalell may not be held liable for the Corporation's debt. ERISA provides that:

> Every employer *who is obligated to make contributions to a multiemployer plan under the terms of this plan or under the terms of a collectively bargained agreement* shall, to the extent not inconsistent with the law, make such contributions in accordance with the

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[3]The First Circuit has not yet ruled on whether this definition of "employer" includes controlling officers or shareholders. *See DeBreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877, 880 n.2 (1st Cir. 1987). That question may be answered when the First Circuit decides an appeal now pending, *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, C.A. No. 86-411-Z (D. Mass. July 14, 1987), *appeal filed* August 27, 1987. To date, most judges in this district have applied the economic reality test urged by plaintiff. *See, e.g., Starrett Paving, supra, slip op.* at 2 (Zobel, J.); *Trustees of Amalgamated Insurance Fund v. Danin*, 648 F. Supp. 1142, 1147 (D. Mass. 1986) (Wolf, J.); *Rubenstein v. Tri-State Transport, Inc.*, 646 F. Supp. 1, 2 (D. Mass. 1984) (Skinner, J.); *Alman v. Taunton Sportswear Mfg. Corp.*, C.A. No. 85-2122-C (D. Mass. June 15, 1987) (Caffrey, J.) *Alman v. Frank's Sportswear Co., Inc.*, C.A. No. 84-2042-S (D. Mass. Jan. 24, 1985) (Skinner, J.) *slip op.* at 8; *Alman v. Servall Manufacturing Co.*, C.A. No. 82-746-MA (D. Mass. April 9, 1984) (Mazzone, J.) *Massachusetts State Carpenters Pension Fund v. Atlantic Diving Co., Inc.*, C.A. No. 83-2872-MA (D. Mass. Oct. 12, 1984) (Mazzone, J.), *slip op.* at 12-13.

> terms and conditions of such plan or such agreement.

29 U.S.C. 1145 (emphasis added). This section does not require *all* "employers" to make such contributions. Rather, the only employers affected are those already "obligated to make contributions . . . under the terms of the plan or under the terms of a collectively bargained agreement. *Id.*

Liability for delinquent contributions is neither created nor directly imposed by this section of ERISA. It is, instead, a matter of contract. *See Solomon v. Laranne Sportswear Corp.*, 648 F. Supp. 407, 409 (E.D.N.Y. 1986) ("ERISA creates no independent substantive duty to make payments beyond that specified in the terms of the plan and the collective bargaining agreement."); *Mason Tenders District Council Welfare Fund v. Dalton*, 648 F. Supp. 1309, 1316 (S.D.N.Y. 1986) (there is an "explicit link in ERISA between an employer's statutory duty to contribute to a benefit plan and the employer's existing contractual obligation to make benefit payments").

Kalell signed the collective bargaining agreement on behalf of the corporation, not as an individual.[4] Even accepting plaintiff's argument that Kalell was a

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[4]An individual might be held liable for debts of a corporation if facts are presented to justify "piercing the corporate veil". *See Alman v. Danin*, C.A. No. 84-50-S (D. Mass. Nov. 13, 1985) (Skinner, J.), *Slip op.* at 11.13, *aff'd* 801 F.2d 1 (1st Cir. 1986) (piercing corporate veil to hold individuals liable for unpaid contributions under ERISA). Plaintiff here concedes that there are no grounds for piercing the corporate veil.

statutory "employer," he, nonetheless, did not fall within that class of "employers" who were contractually bound to contribute to the Funds.

III.

For the above reasons, plaintiff's motion for summary judgment must be denied, and Kalell's cross-motion for summary judgment must be granted.

An order will issue.

/s/ JOSEPH L. TAURO

United States District Judge

United States District Court
District of Massachusetts

RONALD ALMAN, as Trustee, Board of Trustees, Northeast Department, ILGWU Health and Welfare Fund, ILGWU Health Services Plan, and ILGWU National Retirement Fund,

Plaintiff

v.

GEORGE MANUFACTURING CORP. and GEORGE KALELL,

Defendants

CA No. 85-2754-T

ORDER

February 11, 1988
Docketed February 16, 1988
Motion for Reconsideration Denied March 10, 1988

TAURO, D.J.

For the reasons stated in an accompanying memorandum, plaintiff's motion for summary judgment is DENIED. Defendant George Kalell's cross-motion for summary judgment is GRANTED.

It is so ordered.

/s/ JOSEPH L. TAURO
United States District Judge

Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RONALD ALMAN, as Trustee, BOARD of TRUSTEES, NORTHEAST DEPARTMENT ILGWU HEALTH and WELFARE FUND, ILGWU HEALTH SERVICES PLAN, and ILGWU NATIONAL RETIREMENT FUND,

Petitioner,

v.

GEORGE MANUFACTURING CORP.

and

GEORGE KALELL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1008

RONALD ALMAN, as Trustee, BOARD of TRUSTEES, NORTHEAST DEPARTMENT ILGWU HEALTH and WELFARE FUND, ILGWU HEALTH SERVICES PLAN, and ILGWU NATIONAL RETIREMENT FUND,

Petitioner,

v.

GEORGE MANUFACTURING CORP.

and

GEORGE KALELL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the National Coordinating Committee for Multiemployer

Plans (the "NCCMP") respectfully moves for leave to file the accompanying brief *amicus curiae* to urge the Court to review the decision below that a dominant corporate owner/officer cannot be liable for delinquent benefit fund contributions, under Title I of the Employee Retirement Income Security Act ("ERISA"), absent a piercing of the corporate veil. Petitioner has consented to the filing of this brief; Respondents have not.

Interest of the National Coordinating Committee for Multiemployer Plans

The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of ERISA to represent the interests of multiemployer plans and their participants in the development of employee benefit legislation and government regulations under ERISA and other laws. More than 190 multiemployer plans (including those of which the Petitioner is trustee) and related international unions are members of the NCCMP. These plans are fairly representative of all the nation's multiemployer plans, covering more than nine million workers and their families.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to provide the Court with insight concerning the practical, negative implications of the decision below for multiemployer plans and to state the position of trustees, participants, and beneficiaries of such plans. In fact, the NCCMP has recently participated as an *amicus curiae* in *Connolly v. PBGC*, 475 U.S. 211 and *Laborers Health and Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. ——, 91 L.Ed.2d 936 (1988).

As set forth herein, the NCCMP submits that the decision below undermines the national employee benefits policy established by Congress. Affirmance of the decision below would have a significant adverse impact on the financial stability of the nation's multiemployer pension and welfare plans, the benefit security of millions of plan participants and their families, and the federal program that insures certain of these benefits.

The impact of the decision below is to force multiemployer pension plans to provide benefits for services rendered, while denying these plans their full statutory causes of action to collect the contributions that should have been paid for those services. Similarly, the decision below forces multiemployer welfare benefit plans to cease providing medical and other benefits to employees whose employers have reaped the benefits of their labors but refused to fund the benefits for which they labored. Such results are totally at odds with the purposes of ERISA. *See, e.g.*, 29 U.S.C. §§ 1001(b), 1001a.

The NCCMP's brief focuses on issues which it believes may not be adequately presented elsewhere, including:

(a) The particularly adverse impact that the holding below will have on national employee benefits policy and the multitude of multiemployer plans represented by the NCCMP, and

(b) The fundamental conflict between the reasoning in decisions of this Court—as well as those of the First Circuit and her sister Circuits—and the decision of the First Circuit in this case.

The NCCMP respectfully requests that it be permitted to present its views on the decision of the court below, which decision directly affects the present benefits and

future security of the millions of participants whose interests it represents. The NCCMP, therefore, moves for leave to file the accompanying brief *amicus curiae.*

Respectfully submitted,

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Dated: January 1989

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1008

RONALD ALMAN, as Trustee, BOARD of TRUSTEES, NORTHEAST DEPARTMENT ILGWU HEALTH and WELFARE FUND, ILGWU HEALTH SERVICES PLAN, and ILGWU NATIONAL RETIREMENT FUND,

Petitioner,

v.

GEORGE MANUFACTURING CORP.

and

GEORGE KALELL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE PETITIONER

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") submits this brief *amicus curiae* to urge the Court to review the decision below that a dominant corporate owner/officer cannot be liable for delinquent benefit fund contributions under Title I of the Employee Retirement Income Security Act ("ERISA"), absent a piercing of the corporate veil.

I. Interest of the National Coordinating Committee for Multiemployer Plans

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief.

By enacting ERISA, Congress sought to enhance the financial stability of multiemployer plans and to foster the maintenance and growth of such plans. 29 U.S.C. § 1001. The legislative history of ERISA—both as enacted in 1974 and as amended in 1980—confirms the importance of ready and direct access to the federal courts to collect contributions. Ensuring the funding of multiemployer plan benefits through timely payment of employer contributions is one of the statute's principal objectives. *See id.*; 29 U.S.C. § 1001a.

The decision below is contrary to these Congressional goals. It is to elaborate upon these concerns that the NCCMP has filed this brief. As set forth herein, the NCCMP submits that the decision below undermines the national employee benefits policy established by Congress. Affirmance of the decision below would have a significant adverse impact on the financial stability of the nation's multiemployer pension and welfare plans, the benefit security of more than nine million participants and their families, and the federal program that insures certain of these benefits.

The necessary predicate to maintaining the legally mandated financial integrity of multiemployer pension and welfare benefit plans is the implementation of an ongoing system to collect employer contributions. The inability to collect these contributions can lead to inadequate funding of the multiemployer plans involved.

The impact of the decision below is to force multiemployer pension plans to provide benefits for services rendered, while denying these plans their full statutory causes of action to collect the contributions that should have been paid for those services. Similarly, the decision

below forces multiemployer welfare benefit plans to cease providing medical and other benefits to employees whose employers have reaped the benefits of their labors but refused to fund the benefits for which the employees labored. Such results are totally at odds with the purposes of ERISA. *See, e.g.*, 29 U.S.C. §§ 1001(b), 1001a.

By enacting ERISA, Congress sought to enhance the financial stability of multiemployer plans and to foster the maintenance and growth of such plans. 29 U.S.C. § 1001. The legislative history of ERISA—both as enacted in 1974 and as amended in 1980—confirms the importance of ready and direct access to the federal courts to collect contributions. Ensuring the funding of multiemployer plan benefits through timely payment of employer contributions is one of the statute's principal objectives. *See, id.*; 29 U.S.C. § 1001a. The decision below is contrary to these Congressional goals. It is to elaborate upon these concerns that the NCCMP has filed this brief.

II. Reasons for Review

A.

The purpose of multiemployer benefit trusts and the policy underlying the statute which regulates those trusts are one and the same: to protect the interests of participants and to ensure the receipt of promised benefits. *See* 29 U.S.C. §§ 186(c)(5), 1001(b). The assets of multiemployer benefit trusts consist initially of employer contributions, which trustees have a statutory duty to try to collect. *See* 26 U.S.C. § 412; 29 U.S.C. §§ 1082, 1104, 1106, 1132(g)(2), 1145.

ERISA, as enacted in 1974, provided a cause of action for multiemployer plan trustees to collect delinquent contributions. *See, e.g., National Stabilization Agreement of Sheet Metal Indus. Trust Fund v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218, 1219-20 (D.C.

Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). Moreover, ERISA, as enacted in 1974, provided a basis for holding a dominant corporate owner/officer personally liable for payment of delinquent contributions, without resort to judicial corporate veil-piercing. *Laborers' Fringe Benefit Funds—Detroit and Vicinity v. Northwest Concrete & Constr., Inc.*, 640 F.2d 1350, 1352-53 (6th Cir. 1981).[1]

In 1980, ERISA was amended.[2] These amendments were prompted by Congressional anxiety about the financial stability of multiemployer plans and concern that the maintenance and growth of such plans were being discouraged. *See generally* Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980). Nowhere in these amendments is there an express repeal of the aforementioned ERISA cause of action to collect delinquencies from corporations and their dominant owner/officers. And, "it is a venerable rule, frequently reaffirmed by the Supreme Court that 'repeals by implication are not favored, and will not be found unless an intent to repeal is 'clear and manifest.'" *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1984) (citations omitted).

The 1980 amendments were designed, *inter alia*, "to strengthen the funding requirements and enhance the

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[1] In *Northwest Concrete*, the Sixth Circuit reversed the district court's refusal to enjoin the corporation and the individual from future failures to contribute; the district court's judgments against the owner/officer personally and against his corporation were not challenged on appeal. In fact, the Sixth Circuit opinion states that the owner/officer had been ordered to pay delinquent contributions in other cases, too. *Id.*, 640 F.2d at 1353 n.4.

[2] The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208 (1980). Although *Northwest Concrete* and *Commercial Roofing* were finally decided after ERISA was amended, both cases were brought and decided under the provisions of ERISA as enacted in 1974.

financial stability of multiemployer . . . plans," *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981), by assuring that trustees will have the ability to recover delinquent contributions quickly and effectively. *Accord, Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); 29 U.S.C. §§ 1132(g)(2), 1145.

In this regard, the drafters of the 1980 amendments to ERISA expressly focused on five judicial decisions:

> In this regard we endorse judicial decisions such as *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge v. Long's Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, —— F. Supp. ——, 103 LRRM 2219 (W.D. Wash. 1979) and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Company*, C.A. No. 79-0097, USDC D.C., April 22, 1980, are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

126 Cong. Rec. 23,288 (1980) (statement of Sens. Williams and Javits). One of the cases cited by the Congressional drafters—*Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*—involved the personal liability of an owner/officer for delinquent contributions.[3]

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[3] It is unclear from the *McDowell* opinion whether the owner/officer's businesses were incorporated. The district court's decision, denying the multiemployer fund its sought-after relief, was "considered to be incorrectly decided" by the drafters of the 1980 Amendments to ERISA. The decision of the district court was eventually reversed, 673 F.2d 1341 (9th Cir. 1982).

In its summary affirmance of the district court's decision in the instant case, the First Circuit stated that its decision in *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988) is controlling. In *Starrett*, the First Circuit concluded: "We cannot say, under *state* or other relevant federal law that [the dominant owner/officer] simply *is* the corporation . . . [W]e therefore cannot say that the corporation's promise to pay 'is' [the dominant owner/officer's] promise." *Id.* at 24 (emphasis in original). Yet, under ERISA, the dominant owner/officer is the "employer". ERISA defines "employer" as:

> *any person* acting directly as an employer or indirectly in the interest of an employer, in relation to an employee benefit plan. . . .

29 U.S.C. § 1002(5) (emphasis added). A "person" is defined under ERISA as:

> *an individual*, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association or employee organization.

29 U.S.C. § 1002(9) (emphasis added).

So, for example, under the plain language of ERISA and the applicable regulation of the Department of Labor, "a fiduciary is a 'person' . . . under the definition of person contained in [ERISA] section 3(9)." 29 C.F.R. § 2509.75-5 (1987). If the term "person" is defined as excluding corporate officers, then a corporate officer, by definition, cannot be a fiduciary under ERISA. Yet, the federal judiciary has consistently held that corporate officers can be fiduciaries. *E.g., Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984). *Accord* DOL ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (1987). Consequently, an

interpretation of the term "person" under ERISA to exclude corporate owner/officers proves too much.[4]

B.

The First Circuit's decisions in *Starrett* and the instant case directly conflict with the position of the Sixth Circuit in *Northwest Concrete* and the more recent decisions in *West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Co.*, 685 F. Supp. 953 (D.W.Va. 1988) and *Gambino v. Index Sales Corp.*, 673 F. Supp. 1450 (N.D. Ill. 1987).[5] Both the *Gambino* court in the Seventh Circuit and the *Ball Electric* court in the Fourth Circuit held that a corporate owner/officer can be liable for delinquent contributions under ERISA, without resort to judicial corporate veil-piercing.

The federal courts have had no difficulty in finding corporate officers liable under ERISA for fiduciary breaches. *See, e.g., Blatt v. Marshall and Lassman*, 812 F.2d 810 (2nd Cir. 1987); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641 (W.D. Wis. 1979). *Accord, Dardaganis v. Grace Capital, Inc.*, 664 F. Supp. 105 (S.D.N.Y. 1987); *McNeese v. Health Plan Mktg., Inc.*, 647 F. Supp. 981 (N.D. Ala. 1986); *Brock v. Self*, 632 F. Supp. 1509 (W.D. La. 1986). And, the liability imposed in these cases is personal liability.

Since long before the enactment of ERISA, the judiciary has acknowledged "the broader equitable principle

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[4] ERISA also provides that it is unlawful for "any person" to interfere with a plan participant's right to benefits through the use of fraud, force, violence, suspension, fine, or discharge. 29 U.S.C. §§ 1140, 1141. Surely, Congress did not intend to permit corporate owner/officers to interfere with impunity.

[5] The D.C. and Third Circuits have refused to find corporate owner/officers liable as "employers", under ERISA. *International Brotherhood of Painters and Allied Trades Union, et al. v. George A. Kracher, Inc., et al.*, 856 F.2d 1546 (D.C. Cir. 1988); *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985).

that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). *See Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986); *Capital Tel. Co. v. FCC*, 498 F.2d 724, 738 (D.C. Cir. 1974) and cases cited therein. And, regarding the personal liability of corporate owner/officers under ERISA, the First Circuit holds that ERISA "cannot be said to attach great weight to corporate form." *Danin*, 801 F.2d at 2. The First Circuit's position in *Danin* simply cannot be squared with the First Circuit's position in *Starrett* and the instant case, insulating dominant corporate owner/officers from liability for their own actions.

National employee benefits policy underscores that "the continued well-being and security of millions of employees, retirees and their dependents are directly affected by multiemployer plans," 29 U.S.C. § 1001a(a)(3). Therefore, the Congress has not only endeavored to foster multiemployer plan continuation and growth, but it has also established "that minimum standards be provided assuring the financial soundness" of these plans, 29 U.S.C. § 1001(a).

Contributions are the life-blood of employee benefit plans. Consequently, the failure to make contributions constitutes irreparable harm to plans. *See Northwest Concrete*, 640 F.2d at 1353; *Painters Pension Fund v. Hartline-Thomas, Inc.*, 4 Employee Benefits Cas. (BNA) 1199, 1200 (D.D.C. 1983); *Central States, Southeast and Southwest Areas Pension & Health and Welfare Funds v. McNamara Motor Express, Inc.*, 503 F. Supp. 96, 98-99 (W.D. Mich. 1981); *Central States, Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc.*, 472 F. Supp. 1243, 1247 (E.D. Mich. 1979). When an employer—acting through its dominant owner/officer—is able to avoid paying contributions to welfare benefit plans, plan participants are denied the medical

and other benefits for which they labored. For, the plans generally cannot provide benefits that the employer refuses to fund.

Trustees are interested in maximizing the collection of delinquent contributions, and thereby ensuring the uninterrupted payment of benefits. So it is that in the many years that the NCCMP has been in existence, not one of the hundreds of plan trustees represented by the NCCMP—trustees appointed by labor and by management—has ever requested that the NCCMP take a position against personal liability of corporate owner/officers. Neither have any of the millions of plan participants and beneficiaries made such a request. For, the imposition of liability on corporate owner/officers enhances, rather than detracts, from the financial stability of multi-employer plans.

C.

The First Circuit has ignored the reasoning of the judicial decisions under the Fair Labor Standards Act ("FLSA"), even though the FLSA, like ERISA, defines an "employer" as one who acts "directly or indirectly in the interest of an employer . . ." 29 U.S.C. § 203(d). The FLSA provides *inter alia* that "[e]very employer shall pay [minimum wages] to each of his employees . . ." 29 U.S.C. § 209(a).

Between the enactment of the FLSA and the enactment of ERISA in 1974, the federal judiciary had numerous opportunities to construe the definition of "employer" under the FLSA. Often was it argued that since the corporation—not its owner/officer—has employees, only the corporation has the obligation "to pay" described in the FLSA. Yet, in determining who was an "employer" with an obligation "to pay" under the FLSA—*i.e.*, whether only the corporation or also the owner/officer, albeit he/she literally has no employees but does come within the statutory definition of "employer"—the Supreme Court adopted an "economic reality" test. *See Goldberg v.*

Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (recognizing the "expansiveness" of the FLSA definition of "employer"); *Falk v. Brennan*, 414 U.S. 190, 195 (1973). *Accord, NLRB v. Hearst Publications*, 322 U.S. 111, 129 (1944) (similar definition of "employer" under NLRA "to be determined broadly . . . by underlying economic facts rather than technically and exclusively by previously established legal classifications"). Moreover, the liability imposed under the FLSA is for an employer's statutory and contractual obligations. *See* 29 U.S.C. §§ 207(a)(1), 216(b); 29 C.F.R. § 778.108-778.110 (1987) (personal liability for wages calculated at time and one-half the regular rate of pay specified in the collective bargaining agreement).

Consistent with her sister circuits, the First Circuit holds that dominant owner/officers can be held personally liable, as "employers", to pay wages under the FLSA, using the court-fashioned "economic reality" test. *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983). Thus, the First Circuit found an individual, who literally had no employees, liable under an FLSA provision that only applies to an employer with employees. *Id.* In so doing, the First Circuit honored substance over form. Yet, the First Circuit in the instant case and *Starrett*, honoring form over substance, refused to hold an individual personally liable under ERISA for failure to make contributions to a multiemployer plan, even though it is this self-same individual who not only was sole owner of the corporate employer but who also controlled the decision to pay or not to pay the contributions.

CONCLUSION

To hold that dominant corporate owner/officers can escape liability for delinquent contributions, notwithstanding the broad scope of the ERISA definition of "employer", undermines "ERISA's interlocking, interrelated, and interdependent remedial scheme, which is . . . part of a 'comprehensive and reticulated statute.'" *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). For, "[h]aving heard the music, he must pay the piper." *Jim McNeff*, 461 U.S. at 271.

For the foregoing reasons and in recognition that ERISA, too, "must be read in the light of the mischief to be corrected and the end to be attained," *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940), the NCCMP respectfully urges this Court to review the decision of the court below.

Respectfully submitted,

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No. 88-1008

In the

Supreme Court of the United States

October Term, 1988

RONALD ALMAN, as Trustee, Board of Trustees, Northeast Department, ILGWU Health and Welfare Fund, ILGWU Health Services Plan and ILGWU National Retirement Fund,

Petitioner,

v.

GEORGE MANUFACTURING CORP.
and
GEORGE KALELL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Absent facts sufficient to "pierce the corporate veil" of a corporation, is an individual shareholder or corporate officer personally liable under the Employee Retirement Income Security Act for contributions owed by the corporation to multiemployer health, welfare and pension funds?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Ronald Alman ("Alman"), a trustee of various multiemployer benefit funds in the garment industry, Respondent George Kalell ("Kalell"), and George Manufacturing Corp. ("George Mfg."), the corporation of which Kalell was the sole shareholder and president.

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No. 88-1008

In the

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RONALD ALMAN, as Trustee, Board of Trustees, Northeast Department, ILGWU Health and Welfare Fund, ILGWU Health Services Plan and ILGWU National Retirement Fund,

Petitioner,

v.

GEORGE MANUFACTURING CORP.
and
GEORGE KALELL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, George Kalell, respectfully prays that the Court deny the Petition for a Writ of Certiorari sought by Petitioner Ronald Alman to review the memorandum and order of the United States Court of Appeals for the First Circuit entered in the above-entitled proceeding on July 21, 1988.

OPINIONS BELOW

The memorandum and order of the United States Court of Appeals for the First Circuit is not reported and is reprinted as an appendix to the petition at page A-1.

The opinion and judgment of the United States District Court for the District of Massachusetts (Tauro, J.) is reported at 680 F.Supp. 56 and is reprinted as a supplemental appendix to the petition at pages B-1 - B-6.

JURISDICTION

The United States Court of Appeals for the First Circuit entered judgment on July 21, 1988. Petitioner seeks review of the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

Petitioner's claim does not involve any provisions of the Constitution of the United States of America. Rather, Petitioner's claim involves the construction and interpretation of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* The specific provisions involved in Petitioner's claim are 29 U.S.C. § 1145, which requires certain employers to make contributions to multiemployer plans, and 29 U.S.C. § 1002(5), which defines "employer" for the purposes of ERISA. In addition, because Petitioner attempts to draw an analogy between ERISA and the Fair Labor Standards Act ("FLSA"), this action involves 29 U.S.C.

§ 203(d), the FLSA definition of "employer" and 29 U.S.C. § 206(a), the FLSA provision which requires all employers to pay wages in accordance with the FLSA.

The text of 29 U.S.C. § 203(d), 29 U.S.C. § 1002(5), and 29 U.S.C. § 1145 are reproduced in the petition at pages 4-8. The petition does not include the text of 29 U.S.C. § 206(a), which is reproduced in pertinent part below:

Section 206. Minimum Wages

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section. . . .

29 U.S.C. § 206(a).

STATEMENT OF THE CASE

A. Statement of Prior Proceedings

On July 31, 1985, petitioner Alman filed a Complaint against George Manufacturing Corp. ("George Mfg.") and George Kalell ("Kalell"), the sole shareholder and president of George Mfg. The Complaint sought, pursuant to Sections 502(a)(3) and 515 of ERISA, 29 U.S.C. § 1132(a)(3) and § 1145, to collect contributions owed by

George Mfg. to the various multiemployer funds (the "Funds"), of which Alman is trustee. A Consent Judgment was entered against George Mfg. on October 28, 1985, in the amount of $119,358.94, while the action against Kalell proceeded.

Alman filed a Motion for Summary Judgment and Kalell filed a Cross Motion for Summary Judgment. On February 16, 1988, the District Court issued an Opinion and Order allowing Kalell's Cross Motion for Summary Judgment and denying Alman's Motion for Summary Judgment. *Alman v. George Mfg. Corp.*, 680 F. Supp. 56 (D.Mass. 1988). The District Court held that a corporate officer or shareholder may be personally liable for a corporation's unpaid contributions to multiemployer plans only if the circumstances require a piercing of the corporate veil. *Id.* at 58. Since Alman conceded that there was no factual basis to pierce the corporate veil of George Mfg., *Id.* at 58, n.4, the District Court entered judgment for Kalell.

Shortly after the District Court allowed Kalell's Cross Motion for Summary Judgment, the United States Court of Appeals for the First Circuit issued its opinion in a case which presented issues virtually identical to those in *George Mfg. Corp. See, Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988), ("Starrett"). The Opinion in *Starrett* is reproduced as an appendix to the petition at pages A-2 to A-15.

In *Starrett*, the United States Court of Appeals for the First Circuit adopted the reasoning of the District Court in *George Mfg. Corp.*, and held that, absent factors which would justify "piercing the corporate veil", a corporate

officer or shareholder could not be held personally liable for unpaid contributions because such an individual was not "obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement," as required by 29 U.S.C. § 1145. 845 F.2d at 25.

Alman filed an appeal from the District Court's judgment in favor of Kalell. On July 21, 1988, the United States Court of Appeals for the First Circuit granted Kalell's Motion for Summary Disposition and affirmed the judgment of the District Court. The Memorandum and Order of the Court of Appeals, which is reproduced as an appendix to the petition at page A-1, made plain that its decision was based on its earlier holding in *Starrett*.

On December 15, 1988, Petitioner Alman sought review of the decision below by filing a Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

B. Statement of Facts

The District Court summarized the facts in this case in its Memorandum. Briefly stated, George Kalell was the sole shareholder and president of George Mfg., a Massachusetts corporation engaged in the business of garment manufacturing in Boston, Massachusetts. George Mfg. was a party to a collective bargaining agreement with an affiliate of the International Ladies' Garment Workers' Union. George Kalell was not a party to the collective bargaining agreement and signed the agreement solely in his capacity as president of George Mfg. The collective

bargaining agreement required George Mfg. to contribute to the Funds of which petitioner Alman is a trustee.

George Mfg. experienced financial problems and became delinquent in its contributions to the Funds. George Mfg. eventually terminated its operations, at which time it owed the Funds $119,359. As the Funds concede, nothing in Kalell's dealings with George Mfg. would allow the Funds to "pierce the corporate veil". *George Mfg. Corp.*, 680 F.Supp. at 58, n.4.

REASONS FOR DENYING THE WRIT

The Court should deny certiorari because the petition does not present a significant issue of constitutional interpretation or an important question of federal law. The decision of the United States Court of Appeals is not in conflict with other decisions of the Circuit Courts of Appeals, not in conflict with Congressional intent as expressed in ERISA and not in conflict with prior decisions of the United States Supreme Court. Further, there is no connection between this case and any case pending before this Court. There is no compelling reason to grant the petition and hear this case.

A. There is No Constitutional Issue or Important Question of Federal Law

The Petition does not present the Court with any constitutional issue. Instead, Petitioner seeks review of the decision issued by the United States Court of Appeals for the First Circuit which, by its reliance upon *Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving*

Corp., 845 F.2d 23 (1st Cir. 1988), adopted *Starrett's* holding that corporate officers or shareholders could not be liable for contributions owed by the corporation to a multiemployer fund absent facts sufficient to "pierce the corporate veil." The Petitioner opposed this interpretation of ERISA in the District Court and in an *amicus curiae* brief filed with the Court of Appeals in *Starrett*, as well as in a brief filed in the Court of Appeals below. Alman now seeks review of this interpretation of federal law in the United States Supreme Court.

In place of the interpretation of federal law adopted by the United States Court of Appeals for the First Circuit, the Petitioner proposes an interpretation of ERISA that ignores the plain meaning of 29 U.S.C. § 1145, which requires contributions to be made to multiemployer funds only by an employer "who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement." *See North Dakota v. United States*, 460 U.S. 300, 312 (1983) (absent a clearly expressed legislative intention to the contrary, language of a statute is ordinarily regarded as conclusive).

Petitioner ignores the plain meaning of this statute and instead focuses on a flawed analogy between ERISA and the Fair Labor Standards Act ("FLSA"). Petitioner first notes that ERISA's definition of "employer", 29 U.S.C. § 1002(5) is very similar to that of the FLSA, 29 U.S.C. § 203(d). Petition at 21. Petitioner then observes that the FLSA definition of "employer" has been interpreted to include controlling officers or shareholders under an "economic reality" test. Petition at 22. *See Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) (officer

or shareholder who in economic reality controls the corporation is individually liable for the nonpayment of wages to the employees of the corporation). Given the similarity between the ERISA and FLSA definitions of "employer" Petitioner argues that the "economic reality" test should also apply to cases under ERISA, thus imposing personal liability upon a controlling shareholder or officer when a corporation fails to make required contributions to multiemployer funds.

Both the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit decided that they could not ignore the plain language of 29 U.S.C. § 1145 and adopt the analogy suggested by Petitioner. There is no compelling reason for the United States Supreme Court to review those decisions.

Petitioner's analogy between the FLSA and ERISA is fatally flawed because it fails to recognize the difference between the liability-creating provisions of the FLSA, 29 U.S.C. § 206, and ERISA, 29 U.S.C. § 1145. The relevant provision of FLSA provides in pertinent part that "every employer shall pay to each of his employees . . . wages at the following rates. . . ." 29 U.S.C. § 206(a).

This provision statutorily requires *all* employers to pay certain wages,whether or not those employers are so obligated by the terms of a collective bargaining agreement. That being the case, once a court decides that an individual officer or shareholder is an employer under the FLSA, it inevitably follows that such individuals, like

all other employers, are bound to pay wages in accordance with 29 U.S.C. § 206(a) and are personally liable if they do not.

In contrast to the FLSA, the relevant provision of ERISA, 29 U.S.C. § 1145, does not require *all* employers to make contributions to multiemployer plans, only those employers who are obligated to contribute under the terms of a particular multiemployer plan or the terms of a collectively bargained agreement. Since Kalell was not obligated to contribute either by the terms of the plans or of the collective bargaining agreement, he is not liable for unpaid contributions. Thus, the question of whether or not Kalell is an "employer" under 29 U.S.C. § 1002(5) is not dispositive, because, even assuming that Kalell is an employer, under the plain language of 29 U.S.C. § 1145 he is not an employer who is obligated to contribute to the Funds of which Petitioner is a trustee.

Petitioner claims that "[i]n the years since ERISA's passage, the Court has granted certiorari to hear a number of cases involving key questions central to the effectiveness [sic] administration of the statute." Petition at 19. The simple response to this argument is that this Court has often denied certiorari in cases involving provisions of ERISA which, like 29 U.S.C. § 1145, apply only to multiemployer plans. Most recently, the Court refused to hear a case from the United States Court of Appeals for the First Circuit which posed a very similar issue, i.e. whether an individual shareholder or officer could be held personally liable for a corporation's withdrawal liability under ERISA, absent facts sufficient to "pierce the corporate veil" of the corporation. *Debreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877 (1st Cir. 1987), *cert. denied*,

___ U.S. ___, 108 S. Ct. 1024 (1988). Certiorari has also been denied in other cases involving questions of first impression under the multiemployer provisions of ERISA. *See, Trustees of the Amalgamated Insurance Co. v. Geltman Industries, Inc.*, 784 F.2d 926 (9th Cir. 1986), *cert. denied*, 479 U.S. 822 (1986) (denial of certiorari where issue was the application of 29 U.S.C. § 1405(a) and (b), which provide two different methods of limiting the withdrawal liability claims of multiemployer pension plans).

B. There is No Conflict in the Circuit Courts of Appeals

The Petition for a Writ of Certiorari should be denied since there is no split of opinion in the Circuit Courts of Appeals which the United States Supreme Court should resolve. *Rules of the Supreme Court of the United States*, Rule 17.1(a). The decision of the United States Court of Appeals for the First Circuit is consistent with those of the three other Court of Appeals which have directly addressed this issue. In *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985), the United States Court of Appeals for the Third Circuit, using an analysis virtually identical to that of the District Court in *George Mfg. Corp.*, rejected the FLSA analogy relied upon by the Petitioner, holding that "in matters of statutory construction of ERISA our responsibility is to ascertain the intention of Congress in ERISA and not its intention in enacting a separate federal statute." *Id.* at 355. A similar conclusion was reached by the United States Court of Appeals for the District of Columbia Circuit in *Int'l Brotherhood of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546 (D.C.Cir. 1988). In *Kracher*, the Court of Appeals cited *Starrett* with approval and

relied upon reasoning very similar to that of the District Court in *George Mfg. Corp.* and the Court of Appeals in *Starrett*. 856 F.2d at 1549 and 1550, n.26. The United States Court of Appeals for the Ninth Circuit has reached a similar conclusion. *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513 (9th Cir. 1984).

As a result, in what may be the most important consideration in determining whether or not to grant certiorari, the Circuit Courts of Appeals are in complete agreement.

C. There is No Conflict with Congressional Intent

The Petition for Writ of Certiorari should be denied because there is no conflict between the decisions of the United States Court of Appeals for the First Circuit in *George Mfg. Corp.* and *Starrett* and the intent of Congress in enacting ERISA, particularly Section 515 of ERISA, 29 U.S.C. § 1145, the provision crucial to this case. In *Starrett*, the United States Court of Appeals for the First Circuit reviewed the legislative history of 29 U.S.C. § 1145 and found that the "legislative history . . . indicates that the language means what it says." 845 F.2d at 25. The legislative history is replete with statements which make it plain that this section only imposes a duty to contribute on "employers that are already contractually obligated to make contributions to multiemployer plans." Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., the Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration at 44 (Comm. Print 1980). Thus

Petitioner is in error when he argues that the decision in *Starrett* "produces an illogical result at variance with the statute's plain meaning and its broad remedial purposes." Petition at 22.

D. There is No Conflict with Prior Decisions of this Court

Petitioner argues that the decision of the Court of Appeals in *Starrett* misapprehends the decision of this Court in *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, ___ U.S. ___, 108 S. Ct. 830 (1988). In the first place, even a cursory review of *Starrett* demonstrates that the Court of Appeals' discussion of *Advanced Lightweight Concrete* was not central to its decision, but merely one of many reasons for accepting the plain meaning of 29 U.S.C. § 1145, i.e. that the statute only applies to employers who are contractually obligated to contribute to multiemployer plans. The Court of Appeals was correct when it took note of the fact that this Court had held in *Advanced Lightweight Concrete* that 29 U.S.C. § 1145 only permits multiemployer plans to bring suit for contractually required contributions, as opposed to contributions which might be due under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 185(a). ___ U.S. at ___, 108 S. Ct. at 835 (1988).

E. There is No Connection Between this Case and Any Case Pending Before this Court

Petitioner asserts that this case should be considered in conjunction with *Commonwealth v. Morash*, 402 Mass. 287, 522 N.E.2d 409, *cert. granted*, ___ U.S. ___, 109 S. Ct. 53 (1988). Petition at 25. However, as Petitioner freely acknowledges, the issue presented by *Morash* is simply

whether a Massachusetts statute imposing criminal penalties for non-payment of vacation pay is preempted by ERISA. Petition at 26. *Morash* does not raise any of the issues involved here, nor does it interpret the various statutory provisions involved in *George Mfg. Corp.* Conversely, *George Mfg. Corp.* does not deal with preemption under ERISA. The only thing that *George Mfg. Corp.* and *Morash* have in common is that both involve ERISA, hardly a reason for the Court to grant certiorari in this case.

CONCLUSION

The Respondent, George Kalell, respectfully urges that the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit be denied as there is no constitutional issue, no conflict among the Circuit Courts of Appeals, no conflict with Congressional intent and purpose, and no conflict with prior decisions of this Court created by the decision of the United States Court of Appeals for the First Circuit in *Alman v. George Mfg. Corp.* The Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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